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CURRENT EVENTS.

STATE PENSION LAWS.—The Legislature of North Carolina has recently passed an act giving pensions to soldiers who served in the late war, except such as now receive pensions from the United States. The act is designed to give pensions to soldiers of the late Confederate armies. Thirty thousand dollars are appropriated for this purpose. It is estimated that there are somewhere between one thousand and two thousand persons who will become the recipients of this bounty. This would give to each one somewhere between $15.00 and $30.00.

UNIFORM ACKNOWLEDGMENT OF DEEDS.—The *Daily Register*, New York, gives this bit of advice to the Legislature of New York, which might, with equal propriety be extended to several other States whose legislatures are now in session: "Friends of law reform at Albany should interest themselves to promote the passage of the American Bar Association act for simplifying and improving the forms for acknowledgment of deeds. This statute, which has been prepared by a committee of the association as appropriate for adoption in all the States, has already been adopted in Minnesota. It ought to be considered in all the States, and New York should not be behind. It is sometimes thought, by suspicious laymen, that lawyers have a selfish reason for being indifferent to the improvement of the law; but it would be difficult to conceive who could have such a motive for allowing indifference to perpetuate the profitless inconveniences which result to the profession throughout the country from the accidental and unnecessary diversity of forms in such matters as these."

RESTORING THE DEATH PENALTY.—Minnesota has recently restored the death penalty, and the Iowa editors have been discussing the subject of capital punishment vigorously. The idea has been, that if the death penalty were abolished, juries would be more apt to convict; but where the death penalty has been abolished, this expectation has been disappointed. "What follows," says the Boston *Advertiser*, "is seen in every jurisdiction which has abolished the death penalty. The jury, which before faltered in its duty of imposing the extreme penalty, falters still. Justice continues feeble, criminals find themselves but half punished, either through short sentences or early pardons, and society, seeing the results, applauds lynching, and calls for a restoration of the gallows." Nothing deters the criminal classes so much as the spectacle of an occasional "hanging." Of this we have had a strong demonstration in St. Louis. Two or three years ago several executions took place, and life has been much safer in this city since then. If Gov. Marmaduke keeps on commuting the death sentences of murderers as he has begun, he will revive in this State the saturnalia of crime which we experienced in former years.

JUDICIAL OATHS.—It is stated by a recent writer, Louis Claude Whiten, that an effort is being made in Spain to abolish judicial oaths. We notice in turning over the pages of *Hall's Mexican Law*, that judicial oaths have been abolished in that country. In order to give any efficacy to an oath in which a man appeals to God to aid him in telling the truth, it is necessary, of course, that he should be a believer in the existence of God in the ordinary sense, and that he should also believe in a future state of rewards and punishments; in other words, he should neither be an "infidel," an "atheist," nor an "agnostic." It is therefore a necessary feature of the machinery of judicial oaths to exclude the testimony of such persons; and in several States of the Union, whose statute books are still encumbered by the accumulated superstitions of the Middle Ages, the rule of the ancient common law exists making such exclusion. It is so in Pennsylvania, unless there has been a recent change. It is so in Massachusetts, a State which, it must be said, is unsurpassed by any State in the Union in the diffusion of culture and intelligence among its inhabitants, and

which has probably more "atheists," "infidels" and "agnostics" *per capita* among its population than any other State in the Union. But that State has been, from its earliest colonial history, an example of striking contradictions. From the days of the Salem witchcraft to the present time, it has been equally distinguished for intelligence and bigotry. A bill, the effect of which was to allow "infidels," "atheists" and "agnostics" to testify in the courts of that State, was recently defeated in its legislature. According to newspaper reports, the vote in the senate stood 22 against the bill to 10 in its favor. Some of the most pure, honest, upright and distinguished men in Massachusetts are absolutely denied the right to protect by their testimony their liberty, their property and their lives in the courts of justice by the infamous rule which that vote perpetuated. The earliest constitution of Missouri prohibited the enactment of laws making any religious test as a qualification for the holding of a public office, and our present constitution prohibits such tests as a qualification for the witness stand or for the jury box. In view of this fact, would it not be well for certain newspapers to tone down the refrain "Poor old Missouri," and take up the refrain "Poor old Massachusetts?" In many regards Massachusetts has the grandest history of any State in the Union. In the French and Indian war, which preceded the Revolution, her militia did more than that of any other colony. Her part in the Revolution was a grand part. Her sailors, together with those of Connecticut and Rhode Island, have, for the most part, driven the flags of all other nations from that most perilous and laborious work of sea-faring men,—whale-fishing. Her statesmen have always been eloquent for freedom and justice. Her rich men have been distinguished for munificent gifts in behalf of learning and charity. Sufferers from fire, flood and pestilence, in every section of our common country, have been the recipients of the generous donations of her citizens. When we think of these things, we may well say, "Grand old Massachusetts!" But when we think of the fate of the bill in the Massachusetts Senate, just spoken of, we feel like saying, "Poor, old, narrow-contracted, hide-bound, bigoted, Middle-Aged, ante-deluvian, crustacean, superstitious, puritanical, praise-God-bare-bones, hew-Agag-hip-and-thigh, zeal-of-the-land-busy, I-am-better-than-thou, Massachusetts!"

NOTES OF RECENT DECISIONS.

CONSTITUTIONAL LAW—RIGHT OF TRIAL BY JURY—STATUTE REQUIRING VALUE OF PROPERTY KILLED BY RAILROAD COMPANY TO BE DETERMINED BY APPRAISEMENT.—The Supreme Court of Montana has lately held that a statute of that Territory, which provides that in case of animals killed by railway trains, the owner shall appoint one appraiser, the railway company another, and these two a third, and that the three appraisers so appointed shall proceed without delay to ascertain the value of the animals killed, and that "the findings of such appraisers shall be taken and held to be conclusive evidence of the value and ownership of, and injury to, such stock"—is unconstitutional, because it deprives the aggrieved party of an appeal from the decision of the appraisers, and of the right of trial by jury.[1] The question seems simple enough, and the conclusion of the court seems perfectly obvious. By analogy to what has been held concerning justices of the peace, the statute would probably have been held valid, if it had allowed either party to take an appeal from the award of the appraisers, to some court in which a trial could have been had *de novo* before a jury.

PROBATE OF WILL FRAUDULENTLY DESTROYED.—Section 1339, of the California Code of Civil Procedure, provides that "no will shall be proved as a lost or destroyed will, unless the same is proved to have been in existence at the time of the death of the testator, or is shown to have been fraudulently destroyed in the life time of the testator, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses." The Supreme Court of California

[1] Graves v. Northern Pacific Railroad Co., 5 W. C. Rep. 699. Opinion by Galbraith, J.

has lately had occasion to consider what circumstances amount to a frandulent destruction of a will, within the meaning of the statute.[2] The petition alleged that the will of Mary Kidder had been "fraudulently burned and destroyed by and through the neglect and inattention of one Laura Stevens, who was then and there the nurse and sole attendant upon said decedent." The evidence of Laura Stevens was: "I handed the will to her, she lay it in her hands like that (showing) and kind of sank, and I just walked around the other side of her and saw it was in the fire. * * * She made a motion of her hand down on one side, like she was half asleep, and the paper went into the fire and was consumed there. * * * I couldn't tell whether it was a throwing or flirting around, but it went into the fire. * * * I was going around like, and with that motion the will went into the fire. I couldn't tell why I didn't get it out of the fire; I didn't know anything about it really; didn't know what to do, nor really didn't think about it." It was held that this was not sufficient evidence of a fraudulent destruction of the will. The most that could be said of the conduct of the nurse was that she had neglected to take the will from the fire; but the evidence did not afford ground for imputing any fraud to her. The court quote with approval the language of the Supreme Court of New York in a similar case: "The question of the fraudulent destruction of a will under this section, must be one of fact. Fraud is never to be presumed. This is a fundamental rule. It is never to be imputed or inferred, but must be proved by satisfactory evidence."[3]

ATTACHMENT—PARTICULARITY OF DESCRIPTION IN OFFICER'S RETURN—IDENTIFICATION BY PAROL EVIDENCE.—The Supreme Court of Montana have lately had occasion to consider what particularity of description is necessary in a sheriff's return to a writ of attachment, where he has levied upon movable chattels.[4] The action was the statutory action of "claim and delivery" against a sheriff, and he justified by virtue of a levy upon the property under certain writs of attachment. In his returns to these writs six head of cattle were described as "six head of cattle branded with different brands." It was held, upon an objection to this return as evidence, that it was not void for want of uncertainty of description, and that it might be aided by parol evidence identifying the cattle levied upon. In a well-reasoned opinion by Coburn, J., the following conclusion is reached: "The object of the statute, which requires a return to a writ of attachment to be specific in the description of property attached, and to be made a public record, is more particularly to protect attaching creditors in cases where the sheriff does not retain the possession of the property; and is intended to supply the same information to a subsequent attaching creditor or purchaser that might be obtained by such a person by seeing the property in the actual possession of the sheriff under the writ, so that thereby he might be put upon inquiry as to a prior claim. In the case at bar, the property was in the actual possession of the sheriff; could be seen and identified as that which had been levied upon. There could be no mistake about that fact; and it was proper that it should appear in evidence that it was the identical property in controversy." The court also quote the language of Judge Drake, in his work on Attachments, where it is said: "Where an officer justifies under an attachment, a misdescription in his return of an article of personal property attached by him, will not vitiate the attachment, if the appearance and use of the article are such that it may have been naturally in good faith so misdescribed. And this is not a question of law to be decided by the court, but of fact, to be tried by a jury." The conclusion of the Montana court is supported by a decision of the Supreme Court of Maine,[5] where the return of the officer was that he had attached "sixty cords of soft cordwood, more or less, now lying near the western end of the bridge leading over McHard's stream;" and it was held that parol evidence was admissible to settle the identity of the property which was a question of fact for the jury.

[2] Estate of Kidder, 5 W. C. Rep. 775.
[3] Timon v. Claffy, 45 Barb. 438, 446.
[4] Silver Bow Mining and Milling Co. v. Lowry, 5 W. Rep. 727.
[5] Darling v. Dodge, 36 Me. 370; see also Briggs v. Mason, 31 Vt. 433.

CRUELTY AS A GROUND FOR DIVORCE.

"Cruel and inhuman treatment," or "extreme cruelty," though recognized as a fit ground for absolute divorce in almost all systems of jurisprudence, received its first authoritative exposition in the celebrated case of Evans vs. Evans, decided by Lord Stowell in 1790. The judgment in this case, at once profound and luminous, has acquired almost the force of a statute. It is distinctly regarded as the leading case on the subject wherever the common law is administered. It has been made the basis of innumerable decisions, and is quoted with approbation by every text-writer and almost every court, both English and American. Lord Stowell declines the task of laying down a direct definition of cruelty, it being unnecessary in the case at bar, but proceeds to say: "The causes must be grave and weighty and such as show an absolute impossibility that the duties of the married life can be discharged. In a state of personal danger no duties can be discharged; for the duty of self-preservation must take place before the duties of marriage, which are secondary both in commencement and in obligation; but what falls short of this is with great caution to be admitted. The rule of *per quod consortium amittitur* is but an inadequate test; for it still remains to be enquired, what conduct ought to produce that effect, whether the *consortium* is reasonably lost, and whether the party quitting has not too hastily abandoned the *consortium*. What merely wounds the mental feelings is in few cases to be admitted, where not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty; they are high moral offenses in the marriage state undoubtedly, not innocent surely in any state of life, but still they are not that cruelty against which the law can relieve. These are the negative descriptions of cruelty; they show only what is *not* cruelty, and yet are perhaps the safest definitions which can be given, under the infinite variety of possible cases that may come before the court. But if it were at all necessary to lay down an affirmative rule, I take it that the rule cited by Dr. Bever from Clarke, and the other books of practice, is a good general outline of the common law, the law of this country, upon this subject. In the older cases of this sort, which I have had an opportunity of looking into, I have observed that the danger of *life, limb, or health* is usually inserted as the ground upon which the court has proceeded to a separation. This doctrine has been repeatedly applied by the court in the cases which have been cited. The court has never been driven off this ground. It has always been jealous of the inconvenience of departing from it, and I have heard no one case cited in which the court has granted a divorce without proof given of a reasonable apprehension of bodily hurt. I say an *apprehension*, because assuredly the court is not to wait until the hurt is actually done; but the apprehension must be *reasonable*; it must not be an apprehension arising merely from an exquisite and diseased sensibility of the mind."[1]

Attention is called to the fact that since the learned judge uses the expression "danger to life, limb, or *health*," it is obviously his intention to include injury to the health in the phrase "apprehension of bodily hurt." And indeed these two expressions will be found side by side in all the reported cases. Upon these broad but strict doctrines was the law founded. And this is the first recognition of the principle that the divorce for cruelty is not intended as a punishment to the wrongdoer, nor as compensation to the injured party, but to avert future danger and harm. It is the method which the State takes, upon the application of the citizen, to preserve his welfare, or perhaps his life.

In 1812 we find Sir John Nichol saying: "It is not necessary to prove acts of personal violence to substantiate a charge of cruelty; it is the acknowledged doctrine that danger to the person or health is sufficient."[2] And in the following year Lord Stowell at last formulated the definition thus: "The definition of legal cruelty is, that which may endanger the life or health of the party."[3] A

[1] Evans v. Evans, 4 Eng. Ecl. 310, 311.
[2] Otway v. Otway, 1 Eng. Ecl. 200.
[3] Waring v. Waring, 1 Eng. Ecl. 210.

well-known case, in 1826, affirms the teachings of Lord Stowell, though making a larger allowance for the effects of harsh words and unkind treatment upon the life or health, and pointing out that the rank, character, and station of the parties are to be taken into consideration.[4]

In 1847, in the Consistory Court of London, the case of Dysart vs. Dysart was heard by Dr. Lushington and a decree refused. An appeal was taken to the Arches Court of Canterbury, before Sir H. Jenner Fust, where the judgment below was reversed and a decree entered. (Care should be taken not to confuse the two reports of the case.) In making an exhaustive review of the extant authorities, the last named judge observes of Lord Stowell's views in Evans vs. Evans, "the learned judge, with reference to the general principles of the law, as applied to that particular case, here states what is *not* cruelty; that occasional sallies of passion, 'if they do not threaten bodily harm,' and what merely wounds the mental feelings, 'where unaccompanied with bodily injury, either actual or menaced,' do not amount to legal cruelty; implying that if they *do* menace bodily harm, these acts do amount to legal cruelty." And at the conclusion of his review of the authorities he says, "these therefore are the principles by which the court is to be guided in its application of the law to the circumstances of the case before it. I am to consider whether there has been what is considered to be actual cruelty in the eye of the law, or an apprehension of bodily harm arising from the conduct of the husband, and whether that apprehension is a reasonable one, which would be sufficient to entitle the wife to the protection of the court."[5]

Hence it will be seen how the doctrine of legal cruelty, in England, founded upon Evans v. Evans, gradually broadened and developed, to keep pace with advancing civilization. It came to be felt that the mind and the health should have as strong a claim upon the protection of the courts as the mere animal body. The doctrine as now administered in that country is best illustrated by the remarks of Sir Jas. Hannen in a case heard before him in 1872. "The cruelty must be of such a character as to endanger the life, the limbs, or the health of the party claiming relief. In saying that it must be such as to *endanger the health* of the complaining party, it does not follow that it must actually reach that point as to cause injury to health. If there is reasonable ground to believe that it will be persevered in, so as to cause mischief, then the complaining party may bring it before the court as constituting legal cruelty, for it is not necessary that he or she should wait until the mischief is done."[6] Other instructive English cases are cited in the note.[7]

The American law of divorce is of course founded upon that of the mother country, as witness the references everywhere made to "those repositories of wisdom and learning the English Ecclesiastical courts." While the laws of the states are not entirely uniform on the subject of legal cruelty, the differences will be found to lie almost exclusively in the phraseology of the statutory enactments, very little in the theories or adjudications of the courts. Among the text-writers on this subject, the one whose researches have been the most thorough, and whose views are the most universally adopted and sanctioned by the courts, is Mr. Bishop. In his treatise on "Marriage and Divorce" he gives the following definition: "Cruelty is such conduct in one of the married parties as, to the reasonable apprehension of the other or in fact, renders cohabitation physically unsafe, to a degree justifying a withdrawal therefrom. As a general description, not as satisfying the requirements of definition, where the full outlines must be given, but as a sort of general description, adapted to the facts of the larger class of cases, and sometimes inaccurately spoken of by judges as definition, cruelty is either actual violence endangering life, limb, or health, or conduct creating a reasonable apprehension of such violence. But there are forms of physical injury involving no violence; and, we shall see, any of these, ac-

[4] Westmeath v. Westmeath, 4 Eng. Ecl. 238.

[5] Dysart v. Dysart, 5 "Notes of Cases in the Ecl. and Mar. Cts.," 200 *et seq.*

[6] Birch v. Birch, 42 L. J., Mat. 24.

[7] Harris v. Harris, 1 Eng. Ecl. 204; Holden v. Holden, 4 Eng. Ecl. 452; Kelly v. Kelly, Law. Rep. 2 P. & M. 31, 59; Neeld v. Neeld, 4 Hag. Ecl. 263; Oliver v. Oliver, 4 Eng. Ecl. 429; Smith v. Smith, 2 Phillim. 207; Wallscourt v. Wallscourt, 5 "Notes Cases Ecl. & Mar. Cts." 1 ?1.

tual or apprehended, is equally legal cruelty. Moreover, the real or apprehended harm to the person must be adequately serious."[8] And again: "Looking at this question in the light of legal reason, we have the following: The divorce suit being founded in nature, which withholds from a wife the capacity to discharge well her duties while in bodily fear of her husband, we find the same law of nature creating an equal impossibility under mental anguish inflicted and dreaded from him. And though the court may not, as Lord Stowell said, have 'any scale of sensibilities by which it can gauge the quantum of injury done and felt,' it may sometimes perceive that it is greater than can be practically endured, as well when falling on the mind as on the body. Equally whether of the one sort or the other, the court must be made affirmatively to perceive that cruelty exists in fact, and is sufficient in degree before it can grant the remedy."[9]

The same writer proceeds further, "At the time when the first edition of this book was written, the prevailing judicial opinion seemed to be, that nothing primarily creating mental anguish was ground of divorce; though, by reason of the influence of the mind on the body, it should as a secondary consequence, in the language of Lord Stowell, 'wear out the animal machine.' This doctrine appeared to the author not only barbarous in itself, but contrary to admitted principles governing this subject of cruelty. On a just view, we have seen, not even apprehended injury to more than the mental part should be required; but, accepting as sound the doctrine which demands more, still, equally to legal reason and to the common understanding, it is as much an act against which the wife needs protection to pass the bane which will destroy the body through her mind as through her stomach. Indeed, in utter wretchedness, in the resulting incapacity to discharge the duties of wife, even in bodily suffering itself, the physical injury which is inflicted through the mind is the least endurable of all; and against it, most of all, she should be defended by the law. These views have been urged in every edition of this work; and they now to every appearance, are adopted and fully established on both sides of the Atlantic."[10] That it is so settled, beyond question, will sufficiently appear from the cases cited hereafter.

The leading American case on the subject is that of Butler vs. Butler, which, though emanating from an inferior court, (one of Common Pleas, in Pennsylvania,) contains so just, reasonable, and able an exposition of the law, that it has come to be everywhere quoted and endorsed. As the volume containing the report of the case is not found in every library, it may be advantageous to quote here at some length. After an exhaustive review of the English cases, the court says, "Aided thus by the lights derived from foreign and domestic jurisprudence, we approach the construction of our own statute with less diffidence. And that construction, in our opinion, is this: That the cruelty within our statute which entitles a wife to a divorce from her husband, is actual personal violence or the reasonable apprehension of it; or such a course of treatment as endangers her life or health, and renders cohabitation unsafe. The latter may exist without the former. Again, a husband may, by a course of humiliating insults and annoyances, practiced in the various forms which ingenious malice could readily devise, eventually destroy the life or health of his wife, although such conduct may be unaccompanied with violence, positive or threatened. Would the wife have no remedy in such circumstances under our divorce laws, because actual or threatened personal violence formed no element in such cruelty? The answer to this question seems free from difficulty when considered with reference to the principles on which the divorce for cruelty is predicated. The courts intervene to destroy the marriage bond, under this head, for the conservation of the life or health of the wife, endangered by the treatment of the husband, The cruelty is judged from its effects, not solely from the means by which those effects are produced. To hold absolutely that if a husband avoids actual or threatened personal violence, the wife has no protection against any means, short of these, which he may resort to and which may destroy her life or health, is to invite such a system of infliction by the indem-

[8] 1 Bishop on Mar. & Div. § 717, (6th Ed.).
[9] *Idem*, § 725.
[10] *Idem*, § 730a.

nity given the wrong-doer. The more rational application of the doctrine of cruelty is to consider a course of marital unkindness with reference to the effect it must necessarily produce on the life or health of the wife, and if it has been such as to affect or injure either, to regard it as true legal cruelty."[11]

In New Jersey the doctrine is substantially the same; personal violence is not necessary, to justify the divorce, but threats and insulting language are sufficient.[12]

In Massachusetts, the early cases adhered very strictly to the letter of the law, and applied the rules on this subject with great severity. But new statutes raised two grounds for divorce, (1) "extreme cruelty," and (2) "cruel and abusive treatment." The former requires personal violence, the latter not. And late cases overrule all early cases not rendered nugatory by this statute. The case of Bailey, 1867, is a careful statement of the law as at present administered, Chapman, J., says, "Upon consideration of the whole subject a majority of the court are of opinion that where a divorce is sought on the ground of cruelty, whether it be cruel and abusive treatment, or cruelty in neglecting and refusing to provide suitable maintenance for the wife, a reasonable construction of the statute requires that it shall appear to be, at least, such cruelty as shall cause injury to life, limb, or health, or create a danger of such injury, or a reasonable apprehension of such danger upon the parties continuing to live together. This is broad enough to include *mere words*, if they create a reasonable apprehension of personal violence, or tend to wound the feelings to such a degree as to injure the health of the party, or create a reasonable apprehension that it may be affected."[13]

The same doctrine obtains in Virginia, as appears by a very long and carefully considered case decided in 1878.[14]

In Georgia also, the doctrine is identical. In a case heard in 1860, among the specifications of error urged by the appellant was the following, "Because the court erred in charging the jury, that if a husband inflicts on his wife, by force or violence, bodily pain or suffering, and especially degrading pain or suffering, such as cowhiding or whipping, this would be cruel treatment. But this, and such as this, is not all that constitutes cruel treatment. The commission of acts which outrage the feelings of modesty and decency, such as threatening to commit, or attempting to commit adultery, or cursing or abusing, or using insulting and opprobrious language, when done between husband and wife, whether by the husband to the wife, or by the wife to the husband, and in the knowledge, or coming to the knowledge, of both; these also, if persisted in and unatoned for, constitute cruel treatment." But the appeal court united in overruling the exception and in stating the above instruction to comprise a correct exposition of the law on the subject.[15]

In Alabama the same interpretation is given, as appears by the cases cited.[16]

In Texas, where the statute is rather more liberal than elsewhere, it is held that a series of studied vexations and deliberate insults and provocations would, of themselves, be sufficient ground for divorce.[17] And that if the husband is guilty of any excesses or cruel treatment which outrage the feelings of the wife and affect her directly and personally in mind or body, a divorce must be granted.[18]

And in Indiana the same doctrine is again upheld. "We may remark of this instruction [one refused by the trial court], that it seems to contemplate an entirely physical, sensuous view of the marriage relation; and if that relation has no aim to the social happiness and mental enjoyments of those united in it, the instruction should have been given. But if it is otherwise, if it be true that we are possessed of social, moral, and intellectual natures, with wants to be supplied, with sus-

[11] Butler v. Butler, 1 Parsons (Pa.) Select Equity Cases, 344-5; see also Elmes v. Elmes, 9 Penna. St. 167; Jones v. Jones, 66 Pa. St. 494; Miles v. Miles, 76 Pa. St. 357.

[12] Graecen v. Graecen, 2 N. J. Eq. Rep. 459; approved in Cook v. Cook, 11 Id. 195. See also Close v. Close, 10 C. E. Greene, 529.

[13] Bailey v. Bailey, 97 Mass. 380-1. Also Ford v. Ford, 104 Mass. 198, and Lyster v. Lyster, 111 Mass. 327.

[14] Latham v. Latham, 30 Gratt. 320.

[15] Gholston v. Gholston, 31 Ga. 628. For a definition, by this court, see Odom v. Odom, 36 Ga. 317. Also, Ozmore v. Ozmore, 41 Ga. 46.

[16] Smedley v. Smedley, 30 Ala. 715; Hughes v. Hughes, 19 Id. 307; King v. King, 28 Id. 315; Moyler v. Moyler, 11 Id. 625; Turner v. Turner, 44 Id. 437.

[17] Sheffield v. Sheffield, 3 Tex. 86.

[18] Wright v. Wright, 6 Tex. 3; Nogees v. Nogees, 7 Id. 543; Shannon v. Shannon, 18 Id. 521; Shreck v. Shreck, 32 Id. 589.

ceptibilities of pain and pleasure; if they can be wounded and healed, as well as the physical part, with accompanying suffering and delight, then, we think, that conduct which produces perpetual social sorrow, although physical food be not withheld, may well be classed as cruel, and entitle the sufferer to relief. And in point of fact, we have no doubt that mere cold neglect, such as is assumed in the instruction, has sent broken-hearted to the grave hundreds of wives, where the dagger, poison, and purposed starvation have sent one." [19]

An interesting case decided in Iowa, in 1867, follows the same doctrine, interprets the word "inhuman" as "indicating an absence of that kindness and tenderness that belongs to a human being," lays down the affirmative principle that to impair *health* is to endanger *life*, and concludes, "It is that treatment which involves the health, and undermines the vigor and soundness of the constitution, which precedes death, and such treatment cannot involve one without involving the other." [20]

Nor are the courts of California out of harmony with the prevalent judicial opinion.[21] And the same is true of Wisconsin.[22]

In Michigan, on a particular phase of the subject, Judge Cooley says, "If a man persistently annoys his wife and family by indecency, he ought at least to be exceedingly careful that he does not at any time also resort to actual violence; for if he does, he cannot claim from the court that charitable construction of his conduct which a man of generally correct deportment may properly demand. * * * * We are not required to look solely at the violence employed by defendant, but in disposing of the case may properly have regard to the general result of his conduct. That conduct is properly to be characterized by the result which it has produced upon the marriage relation and upon the comfort of the complainant therein. A single act of causeless violence may be overlooked, if its consequences are evanescent and leave the relations of the parties substantially undisturbed; but a long continued course of conduct, which, without the fault of the wife results in making the marriage relation unendurable, and in driving her from her husband's house, is clearly, we think, a case of extreme cruelty within the statute." [23]

And in general terms, the same doctrine prevails thoughout the Union. The cases quoted and cited above have been selected as being the most interesting and instructive; not because the States from which they are reported are the only ones holding the doctrine.[24] For a more particular description of what specific acts will constitute cruelty, reference must be had to the text-books.

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[19] Rice v. Rice, 6 Ind. 105; Shores v. Shores, 23 Id. 546.

[20] Cole v. Cole, 23 Iowa, 440-1; Beebe v. Beebe, 10 Id. 133; Knight v. Knight, 31 Id. 451.

[21] Powelson v. Powelson, 22 Cal. 361. See also Eidenmuller v. Eidenmuller, 37 Id. 364; Mahone v. Mahone, 19 Cal. 626; Morris v. Morris, 14 Id. 76.

[22] Beyer v. Beyer, 50 Wis. 254; Pillar v. Pillar, 22 Id. 658.

[23] Briggs v. Briggs, 20 Mich. 43 *et seq.* This case was approved in Bennett v. Bennett, 24 Id. 482; and again in Goodman v. Goodman, 26 Id. 417.

[24] See the following cases: Bascom v. Bascom, Wright, 632; Beatty v. Beatty, Id. 557; Davies v. Davies, 55 Barb. 130; Kennedy v. Kennedy, 73 N. Y. 369; Perry v. Perry, 1 Barb. Ch. 516; Whispell v. Whispell, 4 Barb. 217; Coursey v. Coursey, 60 Ill. 186; Hannan v. Hannan, 16 Ill. 85; Doyle v. Doyle, 26 Mo. 545; Everton v. Everton, 5 Jones (N. C.), 202; Gibbs v. Gibbs, 18 Kans. 419; Harratt v. Harratt, 7 N. H. 196; Poor v. Poor, 8 Id. 307; Payne v. Payne, 4 Hum (Tenn.) 500; Rutledge v. Rutledge, 5 Sneed, 554; Shaw v. Shaw, 17 Conn. 189.

MARRIAGE INSURANCE POLICIES.

WHITE v. EQUITABLE NUPTIAL BENEFIT UNION.

Supreme Court of Alabama, December Term, 1884.

1. *Marriage Brokerage Contracts.*—Marriage brokerage contracts defined, said to be void, and the grounds of their invalidity stated.

2. *Contracts or Conditions in Restraint of Marriage.*—Conditions annexed to conveyances, gifts, devises, legacies, etc., in general restraint of marriage are void; but not so as to conditions imposing a partial restraint, reasonable in itself, in respect of time, place or person.

3. ——. *Marriage Insurance Policies.*—The charter of the "Equitable Nuptial Benefit Union," declared that the object of the association was "to unite acceptable young people in such a way as to endow each with a sum of money, not to exceed $6,000, to be paid at marriage or endowment, according to the regulations adopted." It then provides as follows: "No member will be entitled to any benefit whatever, who marries in less time than three months from the date of his certificate. Every member who shall have been in good standing as a member for at least three months

prior to his marriage shall be entitled to forty dollars per month upon each one thousand dollars named in his certificate, for each whole month of his membership, provided that the sum shall never exceed three thousand dollars, or so much thereof as shall be realized from one marriage assessment on all the members of this class." It is held that this provision is void for two reasons: 1. It worked an absolute restraint of marriage for three months, which restraint, though partial, was not shown to be reasonable. 2. It operated to the general discouragement of marriage by providing that, upon marriage, after the expiration of three months, the member should be entitled to receive $40 on each one thousand dollars named in the certificate, for each whole month of his membership, that is, during the time he shall remain single.

4. *Insurance—Contract Void when not Indemnity.*—A policy of insurance granted to one who has no interest in the thing insured, is a mere wager, and void.

5. ———. *Marriage Insurance Contracts.*—Accordingly, a marriage insurance contract, such as above described, taken out by one person in favor of a person to whom he is not related by affinity or consanguinity, and with whom he has no business relations, and in whose marriage he has no personal interest, is a mere speculative contract and void.¶

6. *Illegal Contracts—No Recovery upon the Common Counts.*—Where parties have entered into an illegal contract, and one has paid money under it, and sues to enforce it, the law will neither aid him in enforcing it, nor in recovering back the money which he has paid under it, the principle being that in such cases the parties are *in pari delicto*, and the law will leave them where they have placed themselves. In an action to enforce such a contract the plaintiff cannot therefore recover, under the common counts in his declaration, any money which he may have paid to the defendant under it.

CLOPTON, J., delivered the opinion of the court:

The special counts of the complaint declare on a contract, called a "marriage insurance policy," issued by the Equitable Nuptial Benefit Union, which is averred to be a corporation, duly incorporated under the laws of this State. The question of the validity of the contract was made by demurrer to the special counts; the causes assigned being, that it is in the nature of a marriage brokerage contract; is in restraint of marriage; and is in the nature of a gambling contract.

A marriage brokerage contract is an agreement for the payment of money, or other compensation, for the procurement of a marriage. Although they may not be a fraud on either party, such contracts are held to be void, and a public mischief, forasmuch as they are calculated to bring to pass mistaken and unhappy marriages, to countervail parental influence in the training and education of children, and to tempt the exercise of an undue and pernicious influence, for selfish gain, in respect to the most sacred of human relations. An essential element in such contract is, the procurement of a marriage oftentimes without regard to the wishes of friends or parents, or to the happiness of the parties most deeply interested. There is no such element in the contract sued on; nor is there anything in its nature that contemplates compensation for the negotation or procurement of any particular marriage. By the contract, it is agreed to pay an amount of money upon the contingency of marriage, but leaves the party in the exercise of entire freedom as to the person with whom he may propose to contract marriage. While in view of the conclusion at which we have arrived, it is unnecessary to decide this question, we have said this much, it being presented by the record, to exclude any inference that in our opinion the contract is obnoxious to this objection.

Without extending this opinion by an unnecessary attempt to consider the different and variant applications of the rules determining the illegality of contracts, and of conditions annexed to gifts or testamentary dispositions in restraint of marriage, we shall refer to those rules that have been generally accepted and recognized. Subject to modifications and limitations by the application of other special rules, dependent upon the facts, whether the condition be precedent or subsequent, or whether there is a gift over, or whether the property be real or personal, all conditions in deeds or wills, and all contracts, executory or executed, that create a general prohibition of marriage, are contrary to public policy, and to "the common weal and good order of society." The rule rests upon the proposition that the institution of marriage is the fundamental support of national and social life, and the promoter of individual and public morality and virtue; and that to secure well-assorted marriages, there must exist the utmost freedom of choice. Neither is it necessary there shall be positive prohibition. If the condition is of such nature and rigidity in its requirements as to operate a probable prohibition, it is void.

On the other hand, conditions in conveyances, or annexed to legacies and devises, in partial restraint of marriage, in respect to time, or place, or person, if reasonable in themselves, and do not virtually and practically create an undue restraint upon the freedom of choice, are not void. Says Judge Story: "But the same principles of public policy which annul such conditions when they tend to a general restraint of marriage, will confirm and support them when they merely preserve such reasonable and prudent regulations and sureties as tend to protect the individual from those melancholy consequences to which an over-hasty, rash, or precipitate match would probably lead." 1 Story Eq. Jur., § 281.

The want of harmony in the adjudged cases does not arise from any ambiguity in the rule itself, but from its comprehensive terms, inasmuch as the application of the rule to the facts of each particular case is submitted to the sound discretion and judgment of the court. The courts apply it, according to their estimation of the relative necessity and importance of preserving the largest liberty in the formation of marital alliances, on the one hand and, on the other, of upholding the prerogative of the dispenser of bounty to dictate the terms upon which its enjoyment shall commence or continue,

and of the right of persons competent to contract to fix the terms of their agreement, so far as may be consistent with the public weal. 2 Lead. Cas. in Eq. 420; Maddox v. Maddox, 11 Grat. 804; Morley v. Rennoldson, 2 Hare, 571; Williams v. Cowden, 13 Mo. 211; 2 Story. Eq. Jur. § 933; Coppage v. Alexander, 38 Am. Dec. 156 (note). Under the operation of this rule, conditions restraining marriage without consent of parents, guardians or executors, or under twenty-one, or other reasonable age, or with particular persons, are held to be valid; and conditions not to marry a man of a particular profession, or that lives in a named town or county, or who is not seized of an estate in fee, are held to be too general, and void. Collier v. Slaughter, 20 Ala. 263; Stackpole v. Beaumont, 3 Ves. 89; Younge v. Furse, 8 D. M. & G. 756; Scott v. Tyler, 2 Bro. C. C. 431, 488.

It is true, these instances of the application of the rule are, in cases of conditions, annexed to gifts, devises or legacies; but illustrate that the condition will be sustained, when it is in the exercise of due and reasonable precaution against rash or improvident marriages. But if it is an evasion of the law, or a cover to restrain marriage generally, or is *in terrorem*, the condition will be declared void. The present is the case of a contract, and these illustrations are helpful only to the extent that contracts in restraint of marriage are dependent upon the same principles.

The charter of "the Equitable Nuptial Benefit Union" declares "the object of the association is to unite acceptable young people in such a way as to endow each with a sum of money, not to exceed six thousand dollars, to be paid at marriage as endowments, according to the regulations adopted." It proposed to accomplish this ostensibly laudable object by the issuance of certificates of membership. The one issued in this case contains, among others, the following provisions:

"No member will be entitled to any benefit whatever, who marries in less time than three months from the date of his certificate. Every member who shall have been in good standing as a member for at least three months prior to his marriage, shall be entitled to forty dollars per month upon each one thousand dollars named in his certificate, for each whole month of his membership, provided that the sum shall never exceed three thousand dollars, or so much thereof as shall be realized from one marriage assessment on all the members of this class."

The restraint of marriage is partial. The counsel for plaintiff insist that the restraint is reasonable, not forbidding marriage, but postponing it, with the consent of the applicant for membership, to a period when it can presumably be made to greater advantage; and therefore should be held valid, by analogy to similar provisions in gifts or testamentary dispositions. No circumstances are proved to show the reasonableness of the restraint. This must be ascertained from the certificate of membership, without the aid of extrinsic and surrounding facts and circumstances. Looking at the certificate, we are forced to the conclusion, that the restraint of marriage for three months is, not for the benefit or advantage of the applicant, but to enable the association to realize a benefit fund, and to keep the applicant in a condition to contribute thereto, by the payment of dues and assessments.

In Hartley v. Rice, 10 East. 22, Lord Ellenborough, C. J., says: "On the face of the contract its immediate tendency is, as far as it goes, to discourage marriage; and we have no scales to weigh the degree of effect it would have on the human mind. It is said, however, that the restraint is not to operate for an indefinite period, but only for six years, and that there might be reasonable grounds to restrain the party for that period. But no circumstances are stated to us to show that the restraint was reasonble; and the distinct and immediate tendency of the restraint stamps it as an illegal ingredient in the contract." And in Sterling v. Sinnickson, 2 South. 756, where the action was on a sealed bill to pay one thousand dollars, provided the obligee was not lawfully married in six months, Kirkpatrick, C. J., after stating the general principal that all obligations restraining marriage generally, are void, says: "And I find no case but in that of legacies, (with one exception of a gift), that gives validity to an instrument when made in contradiction to the principle first mentioned. And the principle of time, place and person appears to apply to legacies only, unless for a good consideration."

It is not stated that there existed any relation between the applicant and the plaintiff, or the association, that would or could have moved either the plaintiff or the association, to impose the restraint from prudential motives in favor of the applicant. A person, having an interest, arising from relationship or close friendship, may, by conditions of partial restraint in gifts or legacies, guard and protect inexperienced youth against rash and improvident marriages; and the husband may restrain his widow in the interest of his children, but, as is added in some of the cases, "this could not be done by a stranger."

In Chalfant v. Payton, 91 Ind. 202, a certificate of membership, issued by "the Immediate Marriage Benefit Association," was held to be contrary to public policy, and illegal—the contract being to pay a sum of money on condition that the member does not marry within two years, and on marriage thereafter to pay a certain sum per day during the time he shall remain unmarried. It may be said that the time of restraint by the contract sued on, is for a much shorter period. By what rule, in the absence of special facts and circumstances, can the reasonableness of the time of restraint be measured? By what scales can the degree of its effect upon the mind of the applicant be weighed? Where a parent restrains the marriage of a child, or a friend prohibits it, the restraint, without the

consent of parents or guardian, until an age at which the child is competent to contract without such consent, does not violate, but is in furtherance of the policy of the law. But when a stranger, without any interest or motive, except for selfish gain, enters into a contract restraining the marriage of another for a definite period of time, the contract, *pro tanto*, violates public policy.

If there were no provision other than the restraint for three months, a doubt as to its illegality might reasonably be entertained; but the restraint for three months is not the full scope of the contract. To obtain a clear comprehension of its nature and tendency, another provision must be observed. The certificate not only makes the payment of the money conditioned on not marrying in less than three months, but provides that upon marriage after the expiration of three months, the member shall be entitled to receive forty dollars on each one thousand dollars named in the certificate, for each whole month of his membership; that is during the time he remains single. Thus the contract contains an inducement to postpone marriage indefinitely, although the member contemplates its consummation at some future uncertain time; for the longer the marriage is postponed, the larger is the sum to be paid. The amount which the member will be entitled to receive is conditioned on the length of time marriage is deferred. This inducement, in connection with the restraint for three months, may have the effect to operate an indefinite postponement; and, as there is no limit, within which the member shall marry, it may operate a general restraint.

Insurance, being an indemnity against loss or risk, is not intended for the benefit of persons having no concern in the subject-matter, nor any interest in the event. In Helmetag v. Miller, it is said: "No principle of the law of life insurance is, at this day, better settled than the doctrine, that a policy, taken out by one person upon the life of another, in which he has no insurable interest, is illegal and void, as repugnant to public policy. * * * Such contracts are aptly termed wager policies, and are entitled to no higher dignity in the eye of the law, than gambling speculations or idle bets as to the probable duration of human life." The same principle, that where there is no insurable interest the policy is invalid, pervades the law of all kinds of insurance. At an early period, marine insurance policies, without interest, were considered as innocent wagers; but now, such policies are held to be void, as contravening the cardinal object of insurance, — indemnity against loss,—and as being dangerous and demoralizing by tempting the insured, having nothing to lose but everything to gain, to bring to pass the event, upon the happening of which the insurance becomes payable, May on Ins. 875. Although the certificate is not properly a policy of insurance, an application of these principles will enable us to arrive at a satisfactory conclusion as to the character of the contract, when considered in the light of the attendant circumstances.

Vandeventer, at the time of making the application, in response to questions propounded, named the plaintiff as the person, to whom the benefit should be paid, and to whom notices of dues and assessments should be sent for payment. There was also an agreement that plaintiff would pay all dues and assessments, which he did, and Vandeventer should receive one third of the proceeds of the certificate when collected, after deducting expenses. It is manifest that, while Vandeventer made the application personally, and is the nominal member, he was the mere instrument to procure the certificate, and that the contract was made really for the benefit of the plaintiff. It must be regarded as virtually and substantially a contract with him.

The plaintiff, not being related to Vandeventer by affinity or consanguinity, and having no business relations with him whatever, had no personal interest in his marital relations. It was speculation on the part of the plaintiff, without interest, upon the probability of Vandeventer's marriage,—as the plaintiff tersely characterized it in his testimony, "a speculation in marriage futures." Such contract is disfavored and disapproved by the law in the interest of the common weal, of good order and general public policy. It subjects the plaintiff to a temptation, for pecuniary advantage, to promote and procure the marriage of Vandeventer, at some future period, by which the plaintiff has nothing to lose. Upon analogous principles in cases of insurance, such contract is, in its nature, a wager contract. Chalfant v. Payton, *supra*.

It is further contended, that if the contract is illegal, the plaintiff is entitled to recover, under the common courts the sum of the dues and assessments paid by him especially from Hundley, by virtue of a special promise. The action was commenced originally by process of attachment against three named individuals, among whom is Hundley, who are described in the affidavit preceding the issue of the writ, as "constituting the Equitable Nuptial Benefit Union, organized under the laws of Alabama." In the margin of the complaint, subsequently filed, the parties are stated in the same manner; but the body complaint reads: "The plaintiff, Alexander L. White, claims of the defendant, the Equitable Nuptial Benefit Union, a corporation composed of the defendants, Oscar R. Hundley, William A. McNeely and Alexander Erskine, Jr., and duly incorporated under the laws of Alabama." The individuals named in the margin as defendants, are mentioned in the body of the complaint, which controls the marginal statement, merely as composing the alleged corporation—*descriptio personæ*. Filing such complaint, and going to trial thereon, operated a discontinuance of the suit against them as individuals, and converted it into an action against the corporation as the sole defendant.

The court will not lend its aid to either party for the enforcement of an illegal, executory contract, in an action to recover for its non-execution; and, where a contract contravening good morals or public policy has been fully and voluntarily executed, and the parties are *in pari delicto*, the court will not interfere with the acquired rights of either at the instances of the other. Hill v. Freeman, 73 Ala. 200. The claim of the plaintiff to recover the dues and assessments paid falls within this rule.

Affirmed.

OFFICER—VALIDITY OF ACTS PERFORMED BY A DEPUTY IN HIS OWN NAME.

WESTBROOK v. MILLER.*

Supreme Court of Michigan, Jan. 28, 1885.

Tax Deed—Execution by Deputy Auditor General.—A tax deed is not invalid because executed by a deputy auditor general in his own name.

Error to Bay.

Avery Brothers for plaintiff, appellant; *Luther Beckwith*, for defendants.

COOLEY, C. J., delivered the opinion of the court:

This is an action of trespass *quare clausum*. Upon the trial the validity of a tax deed [1] was brought in question, and the circuit judge ruled that it was invalid. The only question raised on the record in this court concerns the correctness of this ruling.

The reason for holding the deed invalid was that it was executed by the deputy auditor general in his own name, when, if executed by him at all, it should have been executed in the name of his principal. The statute provides that "the auditor general may appoint a deputy, for whose acts he shall be responsible, and may revoke such appointment at pleasure; and such deputy may execute the duties of the office during the sickness or necessary absence of the auditor general." How. St. § 283. It is one of the duties of the auditor general to execute deeds to carry into effect sales of State tax lands. Public Acts 1881, p. 272. A similar statute respecting the powers and duties of the deputy auditor general has been in existence in this State for many years, and we may take judicial notice that it has been construed in the office of the auditor general as authorizing the deputy to act in his own name when the circumstances exist which authorize him to act at all. A great many deeds have been executed in this manner, and other acts done which are open to question on the same ground. The case is, therefore, one upon which it is probable that large interests depend.

If the question were entirely new, and were presented as a question as to the most proper and correct method of executing the duty by the deputy, we should say, unhesitatingly, that the proper method would be for the deputy to perform the act in the name of his principal. But this is a matter of form rather than that of substance, and the rights, neither of the State nor of any individual, are greater or less because of one form being adopted rather than the other. The objection to a deed executed as this is, even if valid, is purely technical, and if sustained, it must be upon grounds that in no way affect the merits. A similar objection to the acts of other deputies has been several times made in this State. In Calendar v. Olcott, 1 Mich. 344, a deputy county clerk had issued in his own name a writ of summons. The statute empowered the deputy, in the absence of the clerk from his office or from the court, to perform all the duties of the office; and this was held sufficient authority for him to act in his own name. In Wheeler v. Wilkins, 19 Mich. 78, a return by a deputy-sheriff in his own name was held, on the

[1] This indenture, made the ninth day of February, in the year of our Lord one thousand eight hundred and eighty-three, between Hubert R. Pratt, deputy auditor general of the State of Michigan, of the first part, and John M. Hoffman, of Port Huron, Michigan, of the second part, witnesseth: That whereas, in pursuance of the provisions of law, the said party of the second part did, on the ninth day of February, A. D. 1883, become the purchaser of the rights of the State in and to the following described lands, situate in the County of Bay, in said State, which were bid off to the State for taxes assessed thereon in the years 1872, 1873, 1876, 1877, 1878, 1879 and 1880, to-wit: north half of southwest quarter section thirty-three, town nineteen north, of range four east, containing eighty acres, more or less; and whereas, the said party of the second part obtained certificates from the auditor general for the purchase of the above-described lands according to law, and paid to the State treasurer, upon such certificate, the sum of fifty-six dollars and forty-six cents, being the amount of purchase money thereof as provided by law, which certificates have been presented and surrendered to the said auditor general:

Now, therefore, this indenture witnesseth: That the said Hubert R. Pratt, deputy auditor general of the said State of Michigan, in the name of the people of said State, and by virtue of the authority vested in him by the law thereof, in consideration of the premises, and the payment of the purchase money above mentioned, the receipt whereof is hereby confessed and acknowledged, does, by these presents, remise, release, and quitclaim unto the said John M. Hoffman, party of the second part, and to his heirs and assigns, forever, all the rights acquired by the State in virtue of the original sale or sales to the State in the premises above described, subject to all taxes duly assessed thereon.

In testimony whereof, the said Hubert R. Pratt, deputy auditor general as aforesaid, has hereunto set his hand and seal the day and year first above written.

[Signed] HUBERT R. PRATT,
Deputy Auditor General of the State of Michigan.
(Duly witnessed and acknowledged.)

* S. C., 22 N. W. Rep., 256.

authority of Calendar v. Olcott, to be sufficient. People v. Johr, 22 Mich, 461, raised the question whether the indorsement and recording of a county treasurer's bond by the deputy auditor general was sufficient; and the court disposed of it shortly by saying: "As to the indorsement of S. D. Bingham, deputy auditor general, he being a State officer known to the law, we are bound to take judicial notice that he was such officer, and the indorsement or certificate by him has the same force and validity as if signed by the auditor general himself. This shows an approval and acceptance by the auditor general." Page 464.

These cases would seem to settle the question now raised. They are all decided upon statutes which, under specified circumstances, give to deputies the power to perform the duties pertaining to the office of their principals, and a decision under one statute is authority for a like decision under any other. But if, as a new question, the practice were one of doubtful validity, yet having continued for many years under a construction of the statute by the proper executive department of the government, and affecting, as has been said, matter of form only, it ought not now to be disturbed or called in question. The practical construction of the statute has done no mischief, and it should now be accepted as correct. When, in the performance of executive duties, it becomes necessary for the executive department to construe a statute, great deference is always due to its judgment; and the obligation is increased by the lapse of considerable time before its acts are called in question. This has been several times held by the Federal Supreme Court, and by the subordinate courts of the Federal system, and a reference to a few of the cases will be sufficient to show the current of decision. McKeen v. Delancy, 5 Cranch, 22; Surgett v. Lapice, 8 How. 48, 71; Bissell v. Penrose, 8 How. 317; Union Ins. Co. v. Hoge, 21 How. 35, 66; United States v. Gilmore, 8 Wall. 330; United Stated v. Pugh, 99 U. S. 265, 269; United States v. Lytle, 5 McLean, 9; Hahn v. United States, 14 Ct. Cl. 305; Swift v. United States, 14 Ct. Cl. 481. It was also held by this court in the case of Malonny v. Mahar, 1 Mich. 26, where the question was whether a deputy county treasurer had authority to administer a certain oath in the place of his principal, and also in the subsequent case of Britton v. Ferry, 14 Mich. 53. The case of Continental Imp. Co. v. Phelps, 47 Mich. 299, 303, s. c. 11 N. W. Rep. 167, rests in part on the same principle. The cases in other States which hold the same doctrine are too numerous for citation, but as they all rest upon the inconvenience that would arise from unsettling what in good faith has been done in the necessary discharge of public duty, many citations would only serve to show the frequency in which the occasions for the application of the principle arose. As we have recognized and acted upon the principle heretofore, we may well leave his case to rest upon our previous decisions.

The rule which favors the acceptance of a practical construction of statutes has its limits, and must not be suffered to defeat the manifest purpose of the legislation. Matter of Manhattan Sav. Inst. 82 N. Y. 142. But in this case the practical construction gives effect to the legislative intent nothing but the form of doing so being called in question. It is objected that it does not appear in this case that the circumstances existed which authorized the deputy to act, namely, that the auditor general was sick or necessarily absent. This objection, if available here, would have been equally so in People v. Johr, 22 Mich. 461, in which the presumption in favor of the correctness of official action was held to support the act done.

A new trial must be ordered.

(The other justices concurred.)

DECLARATIONS TO PROVE PEDIGREE.

NORTHROP v. HALL.*

Supreme Judicial Court of Maine, June 10, 1884.

1. EVIDENCE.—*Circumstances under which Declarations are Admissible to Prove Pedigree.*—On the question of pedigree, declarations are admissible, (1) When it appears by evidence *dehors* that the declarant was lawfully related by blood or marriage to the person or family whose history the facts concern. (2) That the declarant was dead when the declarations were tendered, and (3) That they were made *ante litem motam*.

2. ——. *Declarations of Deceased Sister, when Admissible.*—Thus, in determining who are the rightful distributees of an intestate estate, the declarations of the intestate's sister (since deceased) in whose family the claimant was not only born and brought up, but in which the intestate herself also lived when the claimant was born, and for several years thereafter, are admissible, when made *ante litem motam* for the purpose of showing that the claimant was the natural son of the intestate, who had not then been married.

On exceptions.

An appeal from the decree of the judge of probate.

The opinion states the case.

Nathan and Henry B. Cleaves, and *M. P. Frank*, for the plaintiff; *Drummond & Drummond*, and *Clarence Hale*, for the defendant.

VIRGIN, J., delivered the opinion of the court:

This is an appeal from a decree of the judge of probate, wherein he ordered a distribution of an intestate estate, and adjudged, against the claim of the appellant, that he was not the natural son of the intestate, but was the legitimate son of the intestate's sister.

In the Supreme Court of probate to which the appeal was taken, the same question was submitted to a jury who found against the appellant.

At the trial of the issue it appeared *inter alia*

* S. C., 76 Me. 306 (adv. sheets).

that the appellant was born in Steubenville, Ohio, and was brought up there in the family of the intestate's sister, in which also the intestate resided at the time of the appellant's birth and for several years thereafter. The appellant tendered the "declaration of Mary Northrop (the intestate's sister) relative to the birth and parentage of John A. Northrop," the appellant. What the specific declarations were, the bill of exception fails to disclose. It is sufficiently general to include declarations that the appellant was the lawful son of the declarant, which was claimed by the appellee. The admissibility of such a declaration would not be successfully challenged under any known rule of evidence. For the practice in such cases seems to be that some evidence of the requisite relationship (though the exact degree may not be essential perhaps, Vowles v. Young, 13 Ves. 140) *dehors* the declarations must be shown before they can be admitted. Fuller v. Randall, 2 Moore & P. 24; Plant v. Taylor, 7 Hurl. & Nor. 237; Gee v. Ward, 7 E. & B. 514. And this evidence is primarily addressed to the presiding justice, who, before admitting the declarations, must be satisfied that a *prima facie* case of the requisite relationship has been made out. Jenkins v. Davis, 10 Q. B. 313, 322; Hitchins v. Eardley, L. R. 2 P. & D. 248. And the facts shown, the birth, place of birth, the bringing up and the name of the appellant, are ample *prima facie* evidence of relationship to warrant the admission of the declaration mentioned. 4 Camp. 416; Viall v. Smith, 6 R. I. 417. Still there is some apparent discrepancy in the practice. Blackburn v. Crawford, 3 Wall. 175; Jewell v. Jewell, 1 How. 219, 231; Alexander v. Chamberlain, 1 Thomp. & Cook (N. Y. Sup. Ct.), 600.

But the appellant could not be aggrieved by the exclusion of a declaration which would disprove his claim and his exception, for such an exclusion could not therefore be sustained.

Yet, considering the appellant's claim together with the facts and admissions disclosed in the bill of exception, we can have no doubt that the declarations tendered and excluded had a direct bearing upon the issue, and that the question intended to be raised by the parties, is: Whether, in determining who are the rightful distributees of an intestate estate, the declarations of the intestate's sister (since deceased), in whose family he was not only born and brought up, but in which also the intestate herself lived when the appellant was born and for several years thereafter, are admissible for the purpose of showing that he was the natural son of the intestate, who had not then been married.

All of the authorities seem to concur in holding that while her declarations would be competent to show the appellant to be her own illegitimate son, born before her marriage, yet under a rule founded, as Lord Mansfield said, "in decency, morality and policy," her declarations would not be allowed to prove her own son illegitimate if born in wedlock. Goodright v. Moss, Cowp. 591; 1 Greenl. Ev. §§ 253, 344; Haddock v. B. & M. Railroad, 3 Allen, 300; Abington v. Duxbury, 105 Mass. 287. Can her declarations be admitted to show the illegitimacy of her unmarried sister's son born and brought up in her own family? This involves no bastardizing of her own issue.

Formerly the declarations of servants, physicians and intimate friends have been admitted at *nisi prius* in the English courts. But in Johnson v. Lawson, 2 Bing. 86, the court unanimously rejected the declarations of a deceased housekeeper. Best, C. J., remarked that the admission of evidence in such cases must be subject to some limits; limiting declarants to relatives connected by blood or marriage afforded a certain and intelligible rule; and if that were passed, an almost endless inquiry as to the degree of intimacy between the family and the declarant might be involved. Since that decision, all modern authorities excluded eclarations coming from neighbors, intimate acquaintances, etc., of the family as being mere hearsay evidence. Vowles v. Young, 13 Ves. 147; Whitelocke v. Baker, 13 Ves. 514; Jackson v. Browner, 18 Johns, 37, 39. It has, therefore, become a universally recognized exception to the general rule excluding hearsay, based on various sound considerations, that as to certain facts of family history, usually denominated pedigree, comprising *inter alia*, birth, death and marriage, together with their respective dates, and, in a qualified sense, legitimacy and illegitmacy, declarations are admissible: (1) When it appears by evidence *dehors* the declarations that the declarant was lawfully related by blood or marriage to the person or family whose history the facts concern; (2) That the declarant was dead when the declarations were tendered; and (3) That they were made *ante litem motam*. 1 Greenl. Ev., §§ 103, *et seq.* and notes; 1 Whart. Ev., §§ 201: *et seq.* and notes; 1 Taylor Ev., §§ 571, *et seq.* and notes; Best, Prin. Ev. (Am. ed.), § 498 and notes.

Lord Ch. Eldon said such declarations "are admissible upon the principle that they are the natural effusions of a party who speaks upon an occasion when his mind stands in an even position without any temptation to exceed or fall short of the truth, * * * that they must be from persons having such connection with the party to whom they relate, that it is natural and likely, from their domestic habits and connections, that they are speaking the truth and cannot be mistaken."

Lord Ch. Erskine declared that the "law resorts to hearsay evidence of relations upon the principle of interest in the person from whom the descent is to be made out." Vowles v. Young, *supra*. This view was adopted by Prof. Greenleaf. 1 Greenl. Ev., § 103. And Mr. Taylor sums up the authorities by declaring such declarations admissible coming from such sources, as relatives "may be supposed to have the greatest interest in seeking, the best opportunities for obtaining, and

the least reason for falsifying information on the subject." 1 Taylor, Ev. § 571. Do not the qualifications of Mrs. Northrup come fully up to these requisitions?

In Goodright v. Moss, Cowp. 571, the declarations of parents were held admissible, after their decease, to prove that their son was born before their marriage and was therefore illegitimate; and this case is not questioned on this point in Berkley, Peerage, case 4, Camp. 401.

In Vowles v. Young, *supra*, a new trial was granted because the declarations of a husband that his wife was illegitimate, were rejected.

In Haddock v. B. & Maine Railroad, *supra*, a mother's declarations were admitted to prove the illegitimacy of her daughter by showing that the mother was never married.

So, where the question was whether the plaintiff's mother was the legitimate child of the ancestor, whose land was in dispute, and the record showed the latter's marriage at a certain date, the ancestor's declaration—that "unless he made a will, Louisa (plaintiff's mother) could get nothing,"—was held competent to go to the jury on the question of her illegitimacy. Viall v. Smith, 6 R. I. 417. See also Barnum v. Barnum, 42 Md. 251, 304.

It would seem, therefore, that the declarations of the intestate would be admissible to show that the appellant was her illegitimate son; and if the mother's declaration would be, why would not be those of the mothers's sister, in whose famliy the child was born and brought up, and in which the mother lived at the time and for years after?

It is urged that there are some English authorities which somewhat tend otherwise.

In Bamford v. Barton, 2 Moo. and R. 28, where one K, died seized of land, leaving none but illegitimate children, to whom he willed for life, his property with remainder to his own lawful heirs, who brought ejectment claiming the devisees for life to be dead; and to prove it, offered the declarations of one of them, who had since died, to prove the decease of the other, Patterson, J., at *nisi prius*, held the declarations inadmissible on the ground that the declarant was not, in point of law, a member of the family of his reputed father." We also entertain the same opinion, and for the same reason.

In Crispin v. Doglioni, 2 S. & Tr. 44, decided in the probate court in England, in 1863, the plaintiff claimed to be the natural son of the intestate. To prove it, he tendered the declarations of a deceased brother of the intestate. Sir C. Creswell, after remarking there was no case in point, held the declarations inadmissible, saying: "The admissibility of hearsay evidence is exceptional, and ought not to be carried further than the decisions in the books, for it is a departure from the first rule of evidence. I can well understand that when a matter is likely to be discussed and well known in a family, a member of the family may be allowed to give evidence of it; but in this case the plaintiff, according to his own account, is *fullius nullius*, by our law. The question is whether a declaration of one brother may be admitted as to another brother having had intercourse with a woman, and having had a child by her; I think it ought to be excluded." We cannot perceive any objection to this ruling. No one can pretend that it comes within the exception admitting hearsay, for the putative father has no relationship with his bastard son, and hence the case is not applicable to the case at bar. Moreover, the case is especially sound in England, and it might there be considered as applicable to a case having the same facts as in the case at bar. For by the common law, in order to "render odious illicit commerce between the sexes and to stamp disgrace on the fruits of it, notwithstanding the punishmeut usually fell upon the innocent, it was thought wise to prohibit the offspring from tracing their birth to a source which is deemed criminal by law." Cooley v. Dewey, 4 Pick. 95. Hence bastards were said by the common law to be the "children of nobody," and could not transmit by descent except to their own offspring. 1 Black. Com. 459; 2 Kent's Com. (12th ed.) 212-13; Hughes v. Decker, 38 Maine, 152, 160. And such was the law in this State until 1838, when the legislature, as have the legislatures of several other States, ameliorated the rights of illegitimate children. "This relaxation in the laws in so many States," says Ch. Kent, "of the severity of the common law, rests upon the principle that the relation of parent and child, which exists in this unhappy case, in all its native and binding force, ought to produce the ordinary consequence of consanguinity." 2 Kent's Com. (12th ed.) 214. By the statutes of this State, "an illegitimate child is the heir of his mother," and "his estate descends to his mother when he dies intestate without issue." R. S., c. 75, §§ 3 & 4.

We are of the opinion, therefore, that inasmuch as the relationship of sister existed between the intestate and the declarant, and, by force of the statute, that of mother and son between the intestate and the appellant, the declarations came literally within the exception and are consequently admissible; and that the jury should be allowed to pass upon their weight, if they find they were ever made, in connection with the other testimony in the case.

Exceptions sustained.

PETERS, C. J., WALTON, DANFORTH, SYMONDS and EMERY, JJ., concurred.

WEEKLY DIGEST OF RECENT CASES.

1. ATTORNEY—*Disbarment for Conviction of Felony Appealed from and Undetermined.*—The Supreme court cannot disbar an attorney, under § 288 of the code of civil procedure, upon receipt of a certified copy of the record of a justice of the peace convicting him of embezzlement, if it appear that an appeal had been taken from the judgment of conviction, which was undetermined at the time the application to disbar was made. *People v. Treadwell*, S. C. Cal. Feb. 2, 1885; 5 W.C. Rep. 354.

2. BOUNDARIES—*Close to the Edge of a Mill Pond*—The following boundaries were given in a deed: "thence easterly on said line to Wilson pond; thence northerly by the shore of said pond to Hiram Norris' land." *Held*, that the land conveyed extended to low-water mark. *Stevens v. King*, Kennebec, May 29, 1884; 76 Me. 197.

3. CONSTITUTIONAL LAW — *Statute Prescribing Qualifications for Medical Practitioners.*—A territorial statute prescribing certain qualifications for all persons proposing to practice medicine and surgery in the territory, and excluding all persons not having such qualifications except those who were engaged in practice at the time of the passage of the act, is neither an *ex post facto* law, nor a bill of attainder, nor is it in conflict with the fourteenth amendment of the United States Constitution. *Fox v. Territory*, S. C. Wy. T., Sept. 17, 1884; 5 W. C. Rep. 339.

4. CONTRACT—*Damages to Personal Property—Rights of Special and General Owners to.*—A mower company, the owner of a lot of mowing machines, consigned and forwarded them to D, by virtue of a contract under which D was to pay the freight on them and sell them for a specified commission, and account to the company for them at a specified price. *Held*: 1. This contract did not change the title in the machines. 2. D had such special property in the machines as to enable him to maintain an action against a carrier for a wrongful act to the property, in which he would recover, not only his own damages, but such as accrued to the company as general owners. 3. While D might assign his own interest in the judgment to be recovered in such action, he could not assign that which belonged to the general owner. 4. The neglect or refusal of the company to commence and prosecute the action for such damage, is not a waiver of their claim, and they are not estopped from asserting it. 5. A sale of the property after the damage had accrued would not transfer the claim for damages. 6. There can be no division between the company and D, of the damages to be recovered in D's action, until the same have been assessed. 7. The refusal of the company to prosecute the action, makes it equitable that the expenses of that litigation should first be deducted from the judgment recovered, and other expenses, if any, for which D would have a lien, and the balance divided according to their several interests. *Boston etc. R. Co. v. Warrior Mower Co., et al.* Penobscot, June 4, 1884; 76 Me. 257.

5. ——— *Public Policy—Contract to Bring Fictitious Suit.*—A contract between a mortgagor and mortgagee, for the purpose of bringing a fictitious suit to foreclose the mortgage, so as to cut off the right of an apparent senior mortgagee, by which it is agreed that the mortgagee shall secure a judgment and purchase the mortgaged property at execution sale, and hold the same in trust for the mortgagor, is a fraud on the court, and consequently contrary to public policy and void. If the mortgagee procures the property in pursuance of such fraudulent agreement, and afterwards refuses to execute the trust, a court of equity will not compel him so to do. *Connolly v. Cunningham, et al*, S. C. Wy. T., Sept. 24, 1884; 5 W. C. Rep. 343.

6. CONVERSION.—*Counterclaim Claim to Evaporation—the Counterclaim in an Action for Conversion of Petroleum.*—1. Where the owner of a quantity of petroleum delivered it for storage to a company formed for the purpose of transporting and storing such oil, and it was agreed by the owner and the company that certain allowances should be made for evaporation and certain charges be paid for storage, in an action by the owner against the company for an alleged conversion of the oil to its use, the allowance agreed upon for evaporation and the amount due for storage were proper subjects of counter-claim by the company. 2. The conversion of the oil made the company liable for its value, subject to all allowances and charges agreed upon in the receipts of storage; and the owner could not defeat the right of the company to make such allowances and charges a counter-claim by bringing his action as one for trover at common law. *Cow Run Tank Co. v. Lehmer*, S. C. Ohio, Dec. 2, 1884; 13 Weekly L. Bul. 145.

7. CORPORATE STOCK—*Pledge by Apparent Owner—Rights of Innocent Pledgee.*—The owner of stock who voluntarily delivers the endorsed certificates to a third person, allows him to assume the apparent ownership, and cannot recover the same from a pledgee of the latter. *Arnold v. Johnson*, S. C. Cal., Feb. 3, 1885; 5 W. C. Rep. 356.

8. CRIMINAL PROCEDURE—*Objection that List of Witnesses before Grand Jury was not Returned into Court.*—An objection that the foreman of the grand jury did not return into court a list of witnesses sworn before the jury in finding an indictment, comes too late if first taken after verdict; and, whenever taken, the objection is not fatal, the statutory provision requiring a list to be returned being directory merely, and not mandatory, and the court having the power to supply the omission in other ways. *State v. Wilkinson*, Sagadahoe, July 16, 1884; 76 Me. 317.

9. ——— *Instructing Jury on Speculative Question.*—A judge is not required to respond to a request for instructions of a merely speculative character and not material to the issue, however correct the same may be as abstract propositions; nor to repeat in other form legal propositions already correctly and fully given. *Ibid.*

10. ——— *Objection to Instruction—When Made.*—If counsel thinks that a judge in the charge has stated the testimony inaccurately, or expressed any

opinion upon it, or that he has used an illustration unfavorable to his client, the objection should be made before the jury retire, and cannot avail when made for the first time afterwards. *Ibid.*

11. EJECTMENT—*Prior Judgment when a Bar to Subsequent Action.*—In an action by the city and county of San Francisco, to obtain possession of certain land, the title to which is claimed under an alleged dedication, a judgment in a former action between the same parties in favor of the defendant, and a finding that no such dedication was made, is a bar. *People v. Halliday, et al.*, S. C. Cal., Feb. 7, 1885; 5 W. C. Rep. 359.

12. EQUITY.—*Reformation of Contract.*—In an action to reform a contract and for relief thereunder, after the same is reformed the court may specifically enforce the same when that may be done, or may give adequate compensation for its non-performance. *Columbus, etc R. Co. v. Steinfeld*, S. C. Ohio, Dec. 9, 1884; 13 Weekly L. Bul. 147.

13. ———. *Evidence in Such Actions.*—On trial of an action to reform a written substituted contract for fraud or mistake, and to enforce the same when reformed, or if the same could not be reformed, then to rescind the written contract, there may be given in evidence the original writing made by the same parties upon the subject matter in dispute, and also the subsequent acts done or procured to be done by the party charged with the fraud and which tend to prove the fraud or mistake. *Ibid.*

14. ———. *Placing Defendant in Statu Quo.*— 3. On such a trial the court may find that the written contract in dispute does not contain the true agreement of the parties, but if the party complaining neither pays back nor offers to return the money received by him under the contract, it is error to order the contract to be set aside and held for naught. *Ibid.*

15. EVIDENCE.—*Resolution of Board of Directors——Admission as to Salary of Officer.*—A resolution of the board of directors of a corporation stating that the salary of its president for the preceding year was fixed at a certain amount per month, is an admission that the salary was so fixed for the preceding year, but is no evidence of a contract for a salary prior to that time. *Smith v. Woodville Con. S. M. Co.*, S. C. Cal., Feb. 2, 1885; 5 W. C. Rep. 355.

16. FOREIGN DIVORCE.—*Status of American Divorce in Canada.*—The parties were married in New York in 1871 without ante-nuptial contract, both being at the time domiciled in that city. By the laws of the State of New York no community of property was created by such marriage, the wife retaining her private fortune free from marital control, like a *feme sole*. Shortly after the marriage the appellant entrusted respondent with the whole of her private fortune consisting of personalty to the amount of over $200,000, and respondent administered this until 1876. The consorts lived in New York until 1872, when they removed to Montreal, where the respondent has ever since resided and carried on business, but appellant left him shortly after to take up her residence alternately in Paris and New York. In 1880, when respondent was still in Montreal, the appellant, then in New York, instituted proceedings against him for divorce before the Supreme Court of New York on the ground of his adultery. The action was served on respondent personally at Montreal, and he appeared in the suit but did not contest, and appellant obtained a decree of divorce absolute in her favor in December, 1880. In 1881, appellant taking the quality of a divorced woman, and without obtaining judicial authorization, instituted an action against the respondent in the Superior Court in Montreal for an account of his administration of her property. The respondent pleaded that the alleged divorce was null and void for want of jurisdiction of the Supreme Court of New York, that the appellant was in consequence still his wife, and that she should have obtained the authorization of the court to institute the present action. *Held:* (reversing the decision of the Court of Queen's Bench and restoring the judgment of the Superior Court—Strong, J., diss.) 1. That the Supreme Court of New York has jurisdiction to pronounce the divorce, and that the divorce was entitled to recognition in the courts of the Province of Quebec. 2. That the Supreme Court of New York having under the statute law of New York jurisdiction over the subject matter in the suit for divorce, the appearance of the defendant (now respondent) in the suit absolutely and without protesting against the jurisdiction, estopped him from invoking the want of jurisdiction of said court in the present action. 3. That the plaintiff (now appellant) had at the date of the institution of the action for divorce a sufficient residence in New York to entitle her to sue there. (The American doctrine of allowing wife to establish a separate forensic domicile in divorce cases quoted and approved.) 4. (Per Fournier and Gwynne, JJ.) That even if the divorce in question were not entitled to recognition in the courts of Quebec, the action to account could still be maintained under article 14 C. C. P. *Stevens v. Fisk*, S. C. Canada, Jan. 12, 1885, 8 Leg. News, 42.

17. MASTER AND SERVANT.— *Servant of Railroad Killed on Hand Car by Belated Passenger Train.*—A section boss on a railroad and his crew took a hand car to go from Reed's mill to a switch, about one-half mile east, where they would go from the main track upon a second track on their way to work. A passenger train, which should have passed that point one hour and a half before, was behind time. It overtook and run into the hand-car, killing one of the section-men. The foreman did not know and had no reason to believe that the train had not passed and did not send to or go to the telegraph office, which was one mile distant, to ascertain about the passenger train. The deceased did not know of the whereabouts of the belated train, although he had the same opportunity of knowing as the foreman. There was no carelessness in the running of the train. *Held*, that the railroad company could not be required to respond in damages to the representatives of the deceased, as he voluntarily and without protest mounted and rode upon the hand-car. *P. C. & St. L. R. Co. v. Leech*, S. C. Ohio, Dec. 2, 1884, 13 Weekly L. Bul. 153.

18. MINING CLAIM.—*Lode Departing from Vertical Lines—Right to Follow.*—The patentee of a mining claim cannot follow his lode into an adjoining patented claim, where in its onward course or strike, it departs from the vertical side lines into such latter claim. If he does so he is a mere intruder without color of right or title; and in an action of ejectment by the owner of such latter claim, under a tax deed from the original patentee, he cannot dispute the validity of such tax title. *Lebanon Mining Co. v. Rogers*, S. C. Cal., Dec. 19, 1884; 5 W. C. Rep. 310.

19. ———. *Adverse Possession of Mining Claim.*—One claiming title to a patented mining claim by adverse possession, under section 2,186, *et seq.* of the general statutes, must prove not only his claim and color of title, but also the *bona fides* thereof. *Ibid.*

20. ———. *Subsequent Location—Defects in Prior Location.*—A subsequent locator of a mining claim cannot object that all the steps necessary to a valid prior location were not performed at the time of its location, provided they are afterwards performed before his rights attached. This rule is applied when objections are made that claims were not sufficiently marked upon the ground at the time of the location, and in cases of failures to file location certificates within three months after the discovery of the claims. *McGinnis v. Egbert*, S. C. Cal., Dec. 19, 1884; 5 W. C. Rep. 315.

21. ———. *Affidavit of Performance of Work—Time for Filing.*—An affidavit of the performance of work on a lode claim, provided for by section 26 of the general statutes, may be filed as soon as the work is done. The claimant need not wait until after the expiration of the assessment year before filing the same. Such affidavit is not void because it embraces work done on more than one claim. *Ibid.*

22. ———. *Failure to do Necessary Work—Resumption of Work before Re-location.*—If work is resumed on a mining claim, after it has become open to re-location, but before re-location is actually made, the rights of the original locators stand as they would if there had been no failure. *Ibid.*

23. ——— *Act of Congress Extending Time for Doing Annual Labor Construed.*—The Act of Congress of January 22, 1880, fixing the first day of January as the commencement of the annual period for the performance of work on all unpatented mining claims then existing, took effect from the date of its passage, and extended the period for doing such work, if the same would otherwise have elapsed during the year 1880, until the end of such year. *Ibid.*

24. ———. *Contest — Abandonment — Evidence in Rebuttal.*—In a contest concerning the right to a mining claim, when the original locator has established a *prima facie* case, the other cannot rebut the same by evidence that at a prior date a third person had relocated the claim as abandoned property.—*Ibid.*

25. ———. *Declaration of Vendor not admissible after Transfer of Interest.*—Declarations of the original locator of a mining claim, made after he has parted with his interest, are not admissible to impeach the validity of his location.—*Ibid.*

26. ———. *Change in Boundaries — Certificates of Location.* — Where the boundaries of a mining claim, as originally located, are changed after the recording of the original location certificate, so as to leave the discovery shaft outside, the validity of the location cannot be sustained by reason of an additional location certificate, which neither purports to be, nor is sufficient to support, a relocation involving such a change of boundaries.—*Ibid.*

27. ———. *Contest—Verdict, what must state.*—In a proceeding to try the right of possession to a mining claim, under the Act of Congress of May 10, 1872, as amended by the Act of March 3, 1881, a verdict for the defendant, in possession, should state whether the same was returned because the defendant had established his title to the lode, or because the plaintiffs had failed to establish their title.—*Ibid.*

28. MORTGAGE—*Mortgagee Cannot Maintain Trespass.*—A mortgagee of real estate, although claiming under a deed absolute on its face, has a mere lien on the mortgaged premises, and cannot maintain an action to recover damages for a trespass thereto. *Pueblo etc. R. Co. v. Berhoar*, S. C. Cal., Dec. 19, 1884; 5 W. C. Rep. 324.

29. MUNICIPAL CORPORATION—*Liability for Injury through defective Sidewalk.*—The city of Olympia, under its charter and the statutes of the Territory, is liable in an action by a private person for an injury caused by the neglect of the city to repair a defect in one of its sidewalks. *Hutchinson v. City of Olympia*, S. C. Wy. T., Sept. 24, 1884; 5 W. C. Rep. 349.

30. NEGLIGENCE.—*Railroad Crossing—Presumption that Traveller Stopped, Looked and Listened.*—While the rule of law requires a traveller on the highway on approaching its intersection with a railroad to stop, look, and listen for approaching trains, yet in the absence of evidence the presumption is that the traveller did his duty in that respect. *Schum v. Pa. R. Co.*, S. C. Pa., Oct. 6, 1884; 19 Rep. 184.

31. SALES OF PERSONAL PROPERTY—*Conditional Delivery—Refusal of Payment.*—When payment of the purchase money and the delivery of the goods are expressly or impliedly agreed to be simultaneous and the payment is omitted or refused by the purchaser upon getting possession of the goods, the vendor may reclaim them, the delivery being merely conditional. To constitute a conditional delivery, it is not necessary that the vendor should declare the conditions in express terms at the time of delivery. It is sufficient if it can be inferred from the acts of the parties and the circumstances of the case that it was intended to be conditional. *Fishback v. Van Dusen*, S. C. Minn., Jan. 21, 1885; 22 N. W. Rep. 444.

32. ———. *Cash Sale.*—Upon a sale for cash, payment and delivery are concurrent and mutually dependent acts, and neither party is bound to perform without contemporaneous performance by the other.—*Ibid.*

33. ———. *Waiver of Conditions.*—But a delivery on a sale for cash is not necessarily a conditional one, for the vendor may waive the conditions and make the sale absolute by an unconditional delivery. —*Ibid.*

34. ———. *Waiver a Question of Fact.*—Whether there has been such a waiver is a question of fact, viz.: Has the vendor voluntarily and unconditionally delivered the goods without intending to claim the benefit of the condition that the purchase money must be paid before the goods pass to the vendee.—*Ibid.*

35. ———. *Evidence—Unconditional Delivery.*—Evidence in this case considered, and held sufficient to sustain the finding that the delivery was unconditional.—*Ibid.*

36. ——— *Pledge—Mortgage—Executed Contract.* —To constitute an executed contract of either sale, pledge, or mortgage of goods, some specific property must be appropriated to the contract. Until

this is done, the contract is merely executory, and no property passes to the vendee, pledgee, or mortgagee. *Ibid.*

37. —— *Deposit of Grain—Bailment.*—Where a party delivers or deposits grain with another, with an agreement, expressed or implied, that the latter may use and dispose of it, and fulfill his obligations to the former by returning an equal amount of other grain of the same quality, the transaction, in the absence of a statute changing the rule, constitutes a sale, and not a bailment. *Ibid.*

38. —— *Warehouse Receipts—Gen. Laws Minn.* 1876 *Ch.* 86.—Chapter 86 of the General Laws of 1876, entitled "An act to regulate the storage of grain," applies only to cases where there has been a delivery of grain by an actual depositor, and not to a case where a party issues to his creditor an instrument in the form of a warehouse receipt for the purpose of pledging or mortgaging his own property in his own possession to secure his own debt. *Ibid.*

39. STATUTE OF LIMITATIONS—*Note when not Barred by Foreign Statute.*—A note made in California by a resident thereof, may be enforced against the maker in Washington territory, after he has become a resident thereof, if, at the time he left California, the note was not barred by the statute of limitations of that State, nor barred by the statute of limitations of Washington territory at the time suit was commenced. *Adams v. Kelly, et al.*, S. C. Wy. T., Sept. 24, 1884; 5 W. C. Rep. 348.

40. SURETYSHIP—*Extension of Time—Interest in Advance.*—Sureties upon an overdue savings bank note are not discharged by the receipt of interest from the maker for six months longer in advance; although the treasurer tells the principal maker, "We have concluded to let your note lay along if you keep up your interest." *Haydenville Savings Bank v. Parsons*, S. C. Mass., Nov. 1, 1884; 19 Rep. 176.

41. TROVER.— *Prima Facie Evidence of Plaintiff's Title.*—In an action of trover the plaintiff makes a *prima facie* title by showing that the property alleged to be converted was purchased by him from one having possession thereof. *Wontack v. Geist*, S. C. Pa., Oct. 28, 1884; 19 Rep. 187.

42. ——. *Presumption in Case of Timber cut on Land of Third Person.*—In trover for the conversion of timber, when it appears that the timber was cut by the plaintiff's vendor on the land of a third person not a party to the action and whose title is not vested in the defendant, the presumption will be that it was cut rightfully. *Ibid.*

43. TITLE. — *Intermingling Goods.* — The title to goods which have been intermingled is transferred to the innocent owner of a part only where it is impossible to distinguish the goods of one owner from those of the other; where they may be distinguished the title of neither owner is affected, and the claimant must show his title, and to what goods it attaches. *Ibid.*

CORRESPONDENCE.

"FIGHTING THE DEVIL WITH FIRE."

To the Editor of the Central Law Journal:

I quote from you: "*The best members of the legal profession in Missouri have, since the State existed, trafficked in litigation; bought it and sold it as though it were merchandise, and they are still doing it. We ask our learned correspondent if it is not so in Alabama?*"

From a somewhat extensive acquaintance with the legal profession in Alabama, it affords me great pleasure to say that the character you give "to the best members of the legal profession in Missouri," is not the character of the best members of the legal profession in this State. Certainly I have not been so unfortunate in my business and social intercourse with the profession as to find such a character applicable to any considerable number. There are bad men here, generally recognized as bad, engaged in the practice of the law; so it is with every trade or occupation, but they have "their own place," and there they are left by the bar and the general public. Men of ability, because of their questionable practices, have lost place in the profession, and sometimes have been compelled to abandon the profession, and, by force of public opinion, driven from the State. Local bar associations and the State bar association have done something to give tone and elevation of sentiment to the profession. It is true the profession suffers from the distrust engendered by the questionable practices of wicked lawyers, but I deny, as a class, that lawyers are more depraved than other men. When it is true, here, that the best members of the bar are of the character you give the best members of the Missouri bar, I will favor a constitutional amendment excluding the entire profession from every place of public trust and honor. The administration of the law ought not to be committed to lying, unfaithful lawyers—to men who can not be true to the highest trust ever given to the keeping of man. Pardon me for replying to your comments, but I feel invited to do so. I sincerely trust that your severe criticisms will everywhere invoke investigation into the truth of the charges. WM. C. WARD.

Selma, Ala., March 30, 1885.

REMARKS.—We agree that the lawyers as a class are as good as other men; but as their calling is a *profession*, and not a *trade*, and, as it concerns the administration of justice, they ought to be better than other men. We believe that the lawyers of Missouri are, as a class, as good as those of Alabama, and we believe that many of them in good standing in both States have been, and are, in the habit of prosecuting actions of ejectment and damage suits upon agreements to receive an aliquot part of the land or money recovered as a compensation for their services. This makes them speculators in lawsuits, degrades them from the honorable position of *counsellors* and *advocates* into that of *secret parties*, and tempts them into practices which are incompatible with a faithful demeanor toward the courts. We may err in this conclusion as to Alabama, and we do not speak of the East, with which we are not much acquainted; but we have reason to believe that this practice is more or less prevalent throughout the entire West and South. We have not yet seen or heard of any attempt on the part of any bar association to rebuke or correct it.—[ED.

JETSAM AND FLOTSAM.

RIGHT OF THE PUBLIC TO BE ADMITTED TO THE COURTS OF JUSTICE.—On Saturday last the question raised by a correspondent in our columns last week, "Who is the presiding authority in Her Majesty's Courts of Justice?" was answered by Sir James Hannen. He said:—"I wish to say a word or two on a matter that has been pressed upon my attention. There is, of course, very great difficulty in making arrangements during the hearing of an important case like this for those who desire access to the court. I never found any real difficulty during all the years I have sat on the bench in satisfactorily dealing with such matters until I came into these buildings. It is now the constant subject of complaint, and I will therefore state, for the information of the public, the directions I have given as to the admission of the public to this court. They are very simple. This is a public court, admission to which the public are entitled to, provided there is accommodation. I have stated over and over again that while there is sitting accommodation, barristers and others are entitled to admission as a right. A person of whom I know nothing applied to me as a student for permission to be in the court. I informed him of the regulations I had laid down, and I am now told that he has been refused admission. To refuse him admission was an illegal act. I am informed that this person has misconducted himself. That must be the subject of inquiry elsewhere; but whoever refused him admission to this court while there was room, when he had my order, was guilty of an illegal act."—*Solicitor's Journal.*

THE LAST SHOT OF THE SEASON.

Oh, the plumber,
The rich old plumber!
Won't he go it strong next summer?
He can sport store clothes
And shining collars,
Lay off at spas
And spend his $ $ $ $
Happy!
Happy!
Happy old plumber!
To whom a cold winter
Brings a warm summer.

—[*Whitehall Times.*

EVEN HANDED JUSTICE.—Even-handed justice is administered in the Isle of Man. At a Petty Sessions Court held at Douglass on the 14th February, Deemster Gell, Her Majesty's second judge, the Speaker of the House of Keys, the governor's secretary, the high bailiff of Peel, and four members of the Manx bar, were fined 6d each, without costs, for being on licensed premises after 11 o'clock at night, on December 19. Deemster Gell, on that evening, entertained the governor and island officials and advocates, at the Castle Mona Hotel, to dinner, to celebrate his elevation to the bench, and the manager, who had neglected to obtain an "extension of time" license, had been fined 6d a fortnight previously.—*Montreal Legal News.*

GETTING AN EDUCATION.—These answers were given by children of both sexes of from thirteen to seventeen years of age: The earth goes round on its axis. The earth's axis is a pole put through the center of the sun, which turns it round, and thus we get the seasons.—The Nile is the only remarkable river in the world, it was discovered by Dr. Livingstone, and it rises in Mungo Park.—Constantinople is on the Golden Horn, a strong fortress, has a university, and is the residence of Peter the Great.—Its chief building is the Sublime Port.—Oliver Cromwell is said to have exclaimed, because he cut off King Charles's head and got on the throne: "If I had served my God as I served my King, He would not have left me to mine enemies." Also, that the word "Charles" would be found on his heart.—After the wars of 1815 there was a great famine in the land (England), for the country had been plundered and pillaged by foreigners, that the ground would not bear fruit because of its bloodshed, and it was said that "Christ and all His saints slept there."—[From *English Educational Reports.*

A PARK IN CHANCERY.—The *Law Journal* (London), says: "It is to be hoped that Prince Albert Victor before he has been long a member of an Inn of Court will be able to modify the rather gloomy view of the meaning of the words 'in Chancery' which he has gathered as an apt student of 'Bleak House.' Writing of a drive through the wilds of Australia, the royal midshipmen say: 'In many places we drive as through an open English park, only it is a park in Chancery, with the trees fallen and dead and the stumps protruding here and there, and pools uncared for, and the grass growing by their sides, dark and lank.' 'In Chancery' in its opprobrious sense is, like 'drunk as a lord' and other phrases, a survival historically embedded in the language, useful perhaps as marking progress, but happily recording a fact some time past and gone." The pugilist's idea of being in chancery is even worse than that of the royal barrister.

BAD TRIAL JUSTICES.—The Raleigh *News and Observer* recently had the following: "The lawyers of Philadelphia have organized for the purpose of securing the selection of reputable trial justices in criminal cases. This is a move in the right direction. The affliction of the body corporate is that enough interest is not displayed in obtaining respectable administrators of the law. The American judicial system is excellent; and when evils come it is because the better class of the community do not trouble themselves to keep the waters pure and undefiled. The lawyers of Philadelphia have stepped out boldly and wisely. In our own State there are two evils — first, the crowded condition of the dockets with its consequent delay of justice, and the failure of the juries to convict in murder cases."

THE ENGLISH JUDICIAL PENSION LIST. — The deaths of Lord O'Hagan and Sir Robert Phillimore leave the judicial pension list shorter than it has probably been for many years, the only ex-judges of England now living being, we believe, Earl Cairns, Lord Penzance, Lord Bramwell, Sir Henry Singer Keating, and Sir John Mellor, besides Sir Montague E. Smith, who now holds a non-judicial appointment. Since the passing of the Judicature Act, several judges have died whilst still on the bench, or, having resigned on account of ill-health, have died within two or three years afterwards. A few years ago there were a considerable number of ex-judges who, having served their term of fifteen years, had retired from the bench, and only occasionally appeared at the Privy Council—Sir William Erle, Sir Samuel Martin, Sir John Barnard Byles, and Sir Henry S. Keating; but of these the last-named is the sole survivor. There were also no less than three ex-Chancellors—Lord Chelmsford, Cairns, and Hatherley. It seems a pity that Irish ex-Chancellors are not permitted still to be of use on the bench, even though they are not, like Lord O'Hagan, members of the House of Lords. Why should they not become *ex-officio* members of the Court of Appeal at Dublin?—*Law Times* (London).